Tuesday, March 14.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

FEARN *v.* COWPAR.

Process — Proof — Proof or Jury Trial — Reduction of Will on Ground of Incapacity, Essential Error, Fraud and Facility, and Circumvention, and Undue Influence.

In an action for the reduction of a will on the ground of (1) incapacity, (2) essential error as to the nature of the deed executed induced by misrepresentations on the part of the residuary legatee, a bank-agent, who was the testator's confidential business adviser but not his law-agent, (3) fraud and facility and circumvention, and (4) undue influence exercised by the residuary legatee, the Lord Ordinary (Kyllachy) having allowed a proof before answer and refused issues, the Court on reclaiming-note *adhered*, refusing to interfere with what the Lord Ordinary had done in the exercise of his discretion as to the mode of inquiry to be adopted.

Weir v. *Grace*, March 10, 1898, 25 R. 739, *followed*.

Opinions (*per* Lord Young, Lord Trayner, and Lord Moncreiff) that the Lord Ordinary was right in thinking such a case unsuited for trial by jury.

This was an action for the reduction of a trust-disposition and settlement bearing to be made by the deceased Donald Ogilvy, retired farmer, Hill Road, North Muir, Kirriemuir, brought at the instance of Mrs Charlotte Whyte or Fearn, wife of James Fearn, Alyth, with consent and concurrence of her husband, and her husband for his interest, against James Cowpar, bank-agent, Kirriemuir, as trustee and executor, and as an individual and residuary legatee, under the said trust-disposition and settlement, and against the other legatees benefited thereby.

Defences were lodged by the defender James Cowpar.

The pursuer was a first cousin on the father's side, and one of the next-of-kin and heirs *in mobilibus ab intestato* of Donald Ogilvy, and also one of his heirs-portioners.

By the trust-disposition and settlement under reduction, which was dated 12th December 1893, Donald Ogilvy conveyed his whole moveable estate to the said James Cowpar, as sole trustee and executor, whom failing to his brother David Tosh Cowpar, and the trust purposes were (1) payment of debts, deathbed and funeral expenses, and the expense of realising the personal estate, (2), (3), and (4) payment of legacies amounting in all to the sum of £7500 for charitable and religious purposes, (5) a provision of £2000 to be set aside and held in trust for behoof of James Cowpar's mother for her liferent use allenarly, and on her death to be divided equally among her four daughters *nominatim*, and (6) payment of a legacy of £1000 to James Cowpar's brother David Tosh Cowpar. The testator also bequeathed, assigned, and disponed a small heritable property of eight acres to David Tosh Cowpar, and lastly, left, bequeathed, assigned, and disponed the whole residue of his means, estate, and effects, heritable and moveable, to James Cowpar, and his heirs, successors, and assignees whomsoever.

Donald Ogilvy died on 3rd May 1898. The defender stated that he was then sixty-five years of age.

The pursuer averred, *inter alia*, that Donald Ogilvy had been imperfectly educated, and could read and write but little; that from his earliest days he had been eccentric, simple, and weak minded; that he lived with his brother and sister, who never married, and to whose property he succeeded on their deaths in January and November 1893; that he lived in a miserly and sordid fashion; that after the deaths of his brother and sister he was seriously broken down in health and in mind, and that James Cowpar then became his confidential adviser and manager of his business affairs, and that having acquired an ascendancy over him he induced him to execute the will under reduction. "(Cond. 14) The said pretended trust-disposition and settlement is not the deed of the said Donald Ogilvy, but was impetrated and obtained from him by the said James Cowpar by the exercise of undue influence and by fraud and circumvention while the said Donald Ogilvy was weak and facile, and not of sound disposing mind. At the date on which the said pretended trust-disposition and settlement was executed, and for long previously as well as subsequently, the deceased was not mentally capable of appreciating or understanding such a deed or its import and effect, especially as its provisions are involved and difficult. The said James Cowpar obtained it from him by taking advantage of his weakness and facility, aggravated as these were at the time by the recent death of the deceased's said brother Walter, and with the object of securing for himself (Cowpar) and the members of his family the large benefits conferred upon him and them in the said pretended deed to the lesion of the said Donald Ogilvy and his next-of-kin and heirs-at-law. The said Donald Ogilvy was incapable, not only of originating and conceiving, but of giving directions for carrying out and of adjusting such a disposition of his affairs as the said pretended deed bears to carry out and contain. The said James Cowpar conceived and arranged the pretended trust-disposition and settlement in its whole heads, and the pretended charitable bequests which it purports to make were only adopted by the said James Cowpar as a blind for diverting public attention from the great benefits conferred upon himself and the members of his family. The agent by whom the deed was prepared was not the agent of the said Donald Ogilvy, who was unacquainted with him and never gave him any instruc-

tions whatever. The instructions were wholly given by the said James Cowpar, and were (so far as written) written by him. They did not proceed from Donald Ogilvy, and he did not authorise them. The said agent was the said James Cowpar's private agent. He knew nothing of Ogilvy's affairs save what his friend Cowpar told him. Donald Ogilvy never saw the said deed till he was induced by the said James Cowpar to accompany him to Forfar to sign it. He had never received any draft of it, nor was it read over to him or its terms explained to him before the occasion on which it was signed by him. Even when it was ultimately placed before him and signed, he was under essential error with regard to its nature, substance, and effect, induced by the misrepresentations of the said James Cowpar. He did not understand that it was a settlement of his affairs, or that it was a testamentary writing of any kind. It had become a fixed idea with him, as well as with his brother and sister and his uncles the Duncans, that anything that could be done in order to avoid the payment of Government duties on their estates should be carried out by them. The said James Cowpar knowing this idea made use of it, and represented to the said Donald Ogilvy that the said pretended trust-disposition and settlement was a document which would enable his estate to avoid duties. The said Donald Ogilvy's signature to said deed was obtained on the said representation. Further, it was obtained by the said James Cowpar, his confidential adviser in all matters, by the exercise of said overmastering influence which he had obtained over said Donald Ogilvy by flattering him as to his wealth, by indulging him in his weakness for drink, and by representations as to his desire to give him, from the point of view of his superior position and business knowledge, disinterested advice in the management and in the settlement of his affairs. The said Donald Ogilvy had not seen and did not even know the names of the sisters of the said James Cowpar, to whom a sum of £2000 is left under said pretended settlement."

By interlocutor dated 3rd March 1899 the Lord Ordinary (KYLLACHY), after hearing counsel in the procedure roll, before answer allowed parties a proof of their averments, and the pursuer a conjunct probation.

The pursuers reclaimed, and proposed the following issues for the trial of the cause by jury:—"(1) Whether the trust-disposition and deed of settlement libelled, dated 12th December 1893, is not the deed of the deceased Donald Ogilvy? (2) Whether at the time when the name of said deceased Donald Ogilvy was adhibited to the said trust-disposition and deed of settlement the said Donald Ogilvy was in a weak and facile state of mind and easily imposed upon; and whether the defender James Cowpar, taking advantage of said weakness and facility, did by fraud and circumvention impetrate and obtain the said trust-disposition and deed of settlement from the said Donald Ogilvy, to his lesion? (3) Whether the defender James Cowpar was at and prior to 12th December 1893 the confidential agent and adviser of the deceased Donald Ogilvy, and whether he did wrongfully by undue influence induce the said Donald Ogilvy to execute in his favour the said trust-disposition and deed of settlement to the lesion of said Donald Ogilvy? (4) Whether the said Donald Ogilvy when he executed the said trust-disposition and deed of settlement on 12th December 1893 was under essential error as to the substance and effect of the said deed?"

Argued for the pursuers—In this case there were averments of incapacity, essential error as to the nature of the deed executed, and of fraud and facility and circumvention. The case of *Weir* v. *Grace*, March 10, 1898, 25 R. 739, was therefore distinguished from the present. There the pursuer relied upon a presumption of law arising from the fact that the will was made by or under the direction of the testatrix's law-agent, who took the principal benefit under it. The question there was consequently mainly a question of law. Here questions of fact only were raised. The position of the principal defender and his relations with the deceased might be matters of comment, and of inference in fact, but they did not give rise to any legal presumption. The law-agent who prepared the deed did not benefit by it, and no question was raised as to his conduct in the matter. Here it was relevantly averred that the deed was not the deed of the deceased. It was averred that he was incapable of making or understanding the deed under reduction. That was sufficient, for the important point was not his capacity in general, but his capacity in reference to the particular deed in question—*Morrison* v. *Maclean's Trustees*, February 27, 1862, 24 D. 625, *per* L.J.C. Inglis at p. 631. Where, as here, there were averments of incapacity, fraud, and facility and circumvention, the general rule was that the case should go to a jury, and not to proof before a Lord Ordinary—*Clark* v. *Young*, December 8, 1885, 13 R. 313; *Bowman* v. *Mackinnon*, February 4, 1893, 30 S.L.R. 414; *Hope* v. *Hope's Trustees*, October 28, 1898, 6 S.L.T. No. 211, December 15, 1898, 6 S.L.T. No. 310, 36 S.L.R. 220. Though no doubt the Lord Ordinary had a certain discretion in the matter, yet if he had either ignored the general rule referred to or had treated any particular case as an exception to it without being able to give some good reason for doing so, the Court could and would reverse his decision and give effect to the general rule—*Clark* v. *Young*, *cit.* The fact that here there were also averments of undue influence was no reason for refusing to send the case to a jury—*Munro* v. *Strain*, February 14, 1874, 1 R. 522; *M'Callum* v. *Graham*, May 30, 1894, 21 R. 824. The pursuers would not press for a separate issue of undue influence. (2) As to the issues proposed, the pursuers were entitled to the first—*Morrison* v. *Maclean's Trustees*, *cit.* The second was in the ordinary form; the third was not now pressed; and the fourth was in the form of

the issue allowed in *M'Laurin* v. *Stafford*, December 17, 1875, 3 R. 265.

Argued for the defender—(1) The question whether in cases of this kind the case should go to a jury or to proof was a matter within the discretion of the Lord Ordinary, and the Court ought not readily to interfere with what he had done in the exercise of his discretion.—*Weir* v. *Grace*, *cit.* (2) This interlocutor of the Lord Ordinary was right. This case was not suited for trial by a jury. The case nearest to the present was *Weir* v. *Grace*, *cit.* Although the compearing defender here was not the testator's law-agent he was his confidential business adviser, which in a question of this kind amounted to the same thing. The strength of the pursuer's case as averred was the alleged abuse of the defender's influence acquired by acting as his confidential adviser. In all cases of that type, except *Harris* v. *Robertson*, February 16, 1864, 2 Macph. 664, proof and not jury trial was the method of inquiry adopted. See *Grieve* v. *Cunningham*, December 17, 1869, 8 Macph. 317; *Watt* v. *Macpherson's Trustees*, March 2, 1877, 4 R. 601, 5 R., H.L. 9; *Cleland* v. *Morrison*, November 9, 1878, 6 R. 156; *Gray* v. *Binny*, December 5, 1879, 7 R. 332. The case of *Harris*, *cit.* was before the Evidence (Scotland) Act 1866. Even if the issue of undue influence was withdrawn, still the facts upon which that issue was founded would be brought out in evidence, and would be likely to mislead the jury upon the other issue or issues. Even in actions for the reduction of wills on the ground of insanity proof was in some cases allowed instead of jury trial.—*Ballantyne* v. *Evans*, March 3, 1886, 13 R. 652; and *Nisbet's Trustees* v. *Nisbet*, June 30, 1871, 9 Macph. 937; and so also in actions where an insurance policy was alleged to be void as being granted on account of an untrue declaration made by the insured.—*Cruikshank* v. *Northern Accident Insurance Company, Limited*, November 21, 1895, 23 R. 147; and *Weems* v. *Standard Life Assurance Company*, March 5, 1884, 11 R. 658, and 11 R., H.L. 48. (3) Even if the case were sent to a jury, the first proposed issue should not be allowed. There were no averments to support it. It was not said that the deceased had no mind, but merely that he had a weak and facile mind. The defender did not object to the second issue if any issue was to be allowed. The pursuers were bound to set forth the alleged misrepresentation specifically in the fourth issue—*Munro* v. *Strain*, *cit.*; and also that the error was induced by the defender's misrepresentations—*Collie* v. *Pyper*, January 20, 1891, 18 R. 419.

Lord Justice-Clerk—That this is not a very ordinary case I think is manifest from the record. It may be true the ordinary rule is that cases in which facility and fraud and circumvention are alleged are appropriate for trial by jury. But in some cases it is desirable to exercise the power which the Court now has of sending any such case to proof before a judge rather than to send it to a jury.

Now the Lord Ordinary, who I cannot doubt has carefully considered this case, has come to the conclusion that the proper course is to send this case to proof. I think his exercise of the discretion which he had should not be interfered with except upon strong grounds. I see no strong grounds for doing so here, and I therefore think that we ought to adhere to the interlocutor reclaimed against.

Lord Young—I am of the same opinion. I see that in the case of *Weir* v. *Grace* I am reported to have said at the end of my opinion:—"I quite agree with the observation which has been made, I think more than once, in the discussion here, to which I understand your Lordship to assent, that when in any case—certainly in a case of this kind, but I should say when in any case—the Lord Ordinary before whom the case is argued in the Outer House thinks inquiry into the facts is necessary before decision—when that is either obvious or is the result arrived at by him—the mode of the inquiry which he orders ought not, unless in distinctly exceptional circumstances, to be interfered with. And therefore, even if I had thought—contrary to the opinion which I have expressed and entertained—that this case might have been fittingly tried before a jury, I should not have been at all disposed to interfere with the order of the Lord Ordinary to have it tried in the way prescribed." I think these remarks are applicable to this case. I am not of opinion that this is a fitting case for trial by jury. This is a very long record, long and complicated, and I think it does not disclose a case fitted for the consideration of a jury. It will be better that it should be taken before a Lord Ordinary. But apart from that I may add, as in *Weir* v. *Grace*, that I am not disposed to interfere with what the Lord Ordinary has done in the exercise of his discretion.

Lord Trayner—I cannot doubt that the Lord Ordinary took into account all the facts which have been brought under our notice, and gave them grave consideration before pronouncing the interlocutor reclaimed against. But having considered those facts, he has determined, in the exercise of his discretion, that the case ought to go to proof and not to a jury. I think the Lord Ordinary's exercise of his discretion was a wise one. But even if I had any doubt about that, as I have none, I would not think it right to interfere with what he has done, for the reasons stated by myself and my brethren in the case of *Weir* v. *Grace*.

Lord Moncreiff—In this case the pursuer avers and intends to lead proof of (1) mental incapacity, (2) facility and fraud and circumvention, (3) undue influence, and (4) essential error. These are separate and substantive grounds of reduction, and they depend upon different considerations which require careful discrimination.

Apart from the Lord Ordinary's judgment I should have thought that this was not a case for jury trial; but the Lord

Ordinary in the exercise of his discretion having decided that it should go to proof before himself, and it being competent for him to do so, I do not think that we should interfere with what he has done.

The Court adhered and found the reclaimers liable in the expenses of the reclaiming-note.

Counsel for the Pursuers—Sol.-Gen. Dickson, Q.C.—Sym. Agents — Reid & Guild, W.S.

Counsel for the Defender — Balfour Q.C., —Dundas, Q.C.—Donald. Agents—Macrae, Flett, & Rennie, W.S.

Wednesday, March 15.

SECOND DIVISION.

[Lord Low, Ordinary.

CATHCART *v.* CATHCART.

Process—Divorce—Defences Allowed after Reclaiming-Note Presented.

Held that it is in the discretion of the Court to permit defences in a consistorial action to be received and further proof taken after the Lord Ordinary has pronounced decree of divorce and his interlocutor has been reclaimed against.

On 3rd October 1898 James Taylor Cathcart, younger of Pitcairlie, raised an action of divorce for desertion against Mary Unwin or Cathcart of Wootton Park, Staffordshire, wife of the pursuer, and residing in London or elsewhere furth of Scotland.

The pursuer averred that he and the defender were married to each other on 20th July 1887; that on or about 7th September 1887, while they were residing in Pitcairlie, the defender had deserted the pursuer, and that since that date she had been guilty of malicious and wilful desertion of and non-adherence to the pursuer notwithstanding his repeated efforts to get her to return and live with him.

No defences were lodged for the defender. Proof was led before the Lord Ordinary (Low) on 17th December 1898.

At the proof the defender was represented by counsel, who cross-examined the witnesses for the pursuer but led no counter proof.

On the same date the Lord Ordinary pronounced the following interlocutor:—"Finds it established that the pursuer and defender are lawfully married persons, and that the defender wilfully deserted the pursuer, his society, and fellowship, in or about September 1887, and has continued in wilful desertion of the pursuer since that date, being upwards of four years: Therefore divorces and separates the defender Mary Unwin or Cathcart from the pursuer, his society, fellowship, and company, in all time coming: Finds and declares that the pursuer is loosed, acquitted, and freed of the marriage contracted betwixt the defender and him, and that it is lawful for him to marry any other free person whom he pleases in the same manner as if he had never been married to the said defender, or as if she were naturally dead: Finds and declares that the said defender has forfeited all the rights and privileges of a lawful wife, and decerns."

Against this interlocutor the defender reclaimed. When the case came on for hearing the defender asked to be allowed to put in defences, and the case was adjourned in order to allow the pursuer to see the defences and make statements in answer.

In her defences the defender stated that the pursuer never had any real affection for her, and soon after the marriage commenced to treat her with indifference and neglect; that she had left him in consequence of his having committed adultery with a chambermaid named Nellie Watson, residing at Pitcairlie, and that he had been guilty of the following acts of cruelty towards the defender:—(1) On 21st August 1888 at Ashbourne, in the county of Derby, he had assaulted her, gagged her, and dragged her into a carriage, and driven her to Wootton Park, a distance of seven miles, in the early morning, where he forcibly detained her till she was relieved by the chief-constable of the county; (2) in the beginning of 1891 she had been seized, within the precincts of the Royal Courts of Justice, London, by a man named Gaspard, acting in the employment of the defender, and taken to a lunatic asylum called the Priory Asylum, Roehampton Lane, London, where she had been forcibly detained for five months; (3) actuated by vindictive and mercenary motives the pursuer had harassed the defender with lunacy and other proceedings, his sole object being to acquire control of the defender's means and estate.

On consideration of the case being resumed, the pursuer argued — 1. It was incompetent to receive the defences and allow new proof to be led. The defence should have been put in in the Outer House. There was no case in which a defence was allowed for the first time in the Inner House, and it was for the defender to make out that this was competent. A consistorial cause did not differ from an ordinary action, except in this, that if no defence were lodged in the consistorial action, nevertheless the pursuer required to prove his averments before he could get decree. 2. Even if it were competent to receive the defences and allow proof at this stage, the Court in their discretion should refuse to receive them on account of the unsatisfactory nature of the defence—*Longworth* v. *Yelverton*, March 10, 1865, 3 Macph. 645. Appearance for the defender had been made in the Outer House, and everything stated in the defences had been known to her then. The defender's statements were made up of (*a*) a charge of adultery in 1887. In 1889 the defender had raised in England an action for divorce on the ground of adultery and cruelty. She had abandoned the charge of adultery, which was the same as in the present case—*In re Cathcart* [1892], 1 Ch. 552. She was therefore precluded from pleading in this action any acts of adultery